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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHERRY THURMOND, LEVIN HALL, *et al.*,
Petitioners,

v.

DANIEL DELLA-CALCE, LIEUTENANT,
individually and in his official capacity as a Lieutenant
with the City of Huntsville Police Department,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a suit brought under 42 U.S.C. § 1983 alleging the use of constitutionally excessive force, is a police officer entitled to qualified immunity so long as no binding, pre-existing case law prohibits the use of such force in a context so similar as to compel any reasonable officer to understand the effect of the precedent?

2. Did the court of appeals err in finding the commander of a police riot squad entitled to qualified immunity when, in order to enforce his declaration of an unlawful assembly, he ordered his unit to swing their batons in a low, sweeping arc while marching into an isolated group of five passive, motionless demonstrators engaged in civil disobedience, overrunning the demonstrators and striking them repeatedly with batons before placing them in custody?

LIST OF PARTIES

Petitioners:
Levon Hall
David Rollins
Larry Thompson
Sherry Thurmond

Respondent:
Daniel Della-Calce, individually and in his official capacity as a lieutenant with the City of Huntsville Police Department

The City of Huntsville, Officer Mike Culbreath, Officer Paul Jones, and Officer Tommy Mayo are parties to the litigation pending below and in state court, but this petition does not involve claims against them.

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Opinions Below

The opinion of the court of appeals (App., *infra*, 1a) is unreported. The opinion of the district court (App., *infra*, 9a) is also unreported.

Jurisdiction

The court of appeals entered judgment on December 12, 2000 in a per curiam decision. The court denied Petitioners' request for rehearing without comment on January 23, 2001 in a per curiam order. (App., *infra*,). On April 17, 2001, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to May 18, 2001. Petitioners filed a motion to further extend the deadline to May 21, 2001, which is pending. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42, United States Code section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT

1. In the early morning of September 6, 1994, between 800 and 1200 striking rubber workers assembled at the Dunlop Tire Company ("Dunlop") in Huntsville, Alabama. (App., *infra*, 12a). The workers were there to demonstrate solidarity in light of concerns that fellow union members were planning to cross the picket line and return to work. *Ibid.*[1] The Mobile Field Force (MFF) of the Huntsville Police Department reached the scene about 5:00 a.m. that morning. There were numerous incidents of objects being thrown at cars traveling along the road leading to the plant entrance, but those incidents did not occur until the arrival of the MFF. *Ibid.*

Petitioners were among a group of workers demonstrating at the plant's main entrance gate. App., *infra*, 12a-13a; Def. Ex. X.[2] The main gate is not in close proximity

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[1] Because the case arises on respondent's motion for summary judgment, unless otherwise noted or apparent from context, any disputed facts are presented in the light most favorable to petitioners. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[2] Petitioners have lodged with the Court a video with two excerpts edited from the five videos collectively submitted into the record by the parties. The first clip is footage of the confrontation shot by a local television news cameraperson, and identified as Plaintiff's Exhibit 1 in the proceedings

to the area where objects had been thrown at passing cars, and the demonstrators in the gate area numbered approximately enough to fill a single-file picket line on each side of the entrance. *Ibid.* None of the destructive activity occurred near Petitioners and Petitioners were never accused of engaging in such activity. Nonetheless, at approximately 5:45 a.m. the MFF deployed in full riot gear at the main gate. (App., *infra*, 13a); Def. Ex. X. At 5:46 a.m., Respondent Lt. Dennis Della-Calce,[3] commanding officer of the MFF, read an order to the demonstrators over a bullhorn, declaring the picketing an unlawful assembly, ordering the demonstrators to disperse, and advising them that they would be arrested if they failed to do so. *Ibid.* The crowd began to disperse, abandoning the main gate and walking down the road toward their parked vehicles. Pet.'s App. Brf. at 6, Def. Ex. X.

Regardless of the compliance of the picketers, and only one minute after giving his five minute warning, Lt. Della-Calce

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below. The second clip is a police video, shot from the perspective of the advancing line of riot police on the demonstrators, identified as Defendant's Exhibit X in the proceedings below.

[3] Though there were other defendants in this case below, the judgment at issue before the Court is the one in favor of Lt. Della-Calce only.

directed the MFF down the road by main gate, marching towards the retreating demonstrators at a half-step pace while tapping their shields in a show of force. (App., *infra*, 13a); Def. Ex. X.

As the demonstrators were leaving, Petitioners Thurmond, Hall and Hopper decided to stay behind in an act of passive resistence. They sat down cross-legged in the road ahead of the oncoming police. (App., *infra*, 13a). They were positioned between two police squad cars of non-MFF Huntsville police officers who had been stationed at the main gate. Def. Ex. X. There, with the patrolmen standing and watching, they sat and waited for the MFF. *Ibid.*; Pet. App. Brf. at 7-8.

Petitioners Thompson and Rollins joined them in the road, but remained standing, facing the MFF and talking to the police officers. (App., *infra*, 13a); Def. Ex. X. At no time during or prior to the acts at issue were the demonstrators, either at the main gate or elsewhere at the Dunlop plant, aggressive or violent towards the Huntsville Police Department. (App., *infra*, 13a, 23a, 25a). The demonstrators in the main gate area had not been acting with any violence or aggression at all. *Ibid.*

As the MFF got closer, the patrolmen got in their squad cars, put them in reverse, and moved them out of the way of the oncoming MFF line. Def. Ex. X. When the MFF got within several yards of the five Petitioners, Lt. Della-Calce changed the squad's marching orders, from "shield tapping mode" to "swinging baton mode." (App., *infra*, 13a, 23a). The approaching line of MFF officers began swinging their batons in

front of them "with authority" as they marched, consistent with their training to "never stop swinging their batons." *Ibid.*; Pet. App. Brf. at 15. The line of MFF officers marched into Petitioners, overrunning them and clubbing them with their batons. (App., *infra*, 14a). Petitioners Thurmond, Hall and Hopper were placed under arrest. (App., *infra*, 14a). Petitioners Thompson and Rollins, who were on their feet and could run away, did so. Pet. App. Brf. at 13. MFF members continued to strike Petitioners with their batons, fists, feet and knees during the course of the arrest. Pet. App. Brf. at 11-13.

After overrunning Petitioners, Lt. Della-Calce immediately halted the MFF, abandoned the swinging baton tactic, and ordered that tear gas be fired into the remaining crowd. Def. Ex. X. Lt. Della-Calce admitted in deposition and while testifying in the criminal trials of the Petitioners that he had instructed Petitioners to "move or be hit," and that he understood Petitioners would be struck as a consequence of his order. Pet. App. Brf. at 16-21.

All of the Petitioners sought medical attention for their injuries. Pet. App. Brf. 13-14. Ms. Thurmond visited the emergency room, eventually required surgery on her shoulder, and had various other ongoing problems. Mr. Hall sustained injuries to his shoulder, arm and neck, for which he underwent physical therapy of and on for two and one-half years. *Ibid.* Mr. Rollins, Thompson, and Hopper suffered various injuries resulting in swelling and bruising, and Mr. Thompson may have suffered nerve damage. *Ibid.* All the seated Petitioners were struck in the head. *Id.* at 12-13.

During the course of discovery evidence came to light, which, while disputed, revealed that contrary to Lt. Della-Calce's *post hoc* claims that the MFF was trained to bypass passive resisters while in "swinging baton" mode, the MFF were trained to strike all demonstrators, passive or not, when ordered to do so. Pet. App. Brf. at 15-16. They had been trained in a method by which designated arrest teams would advance on passive resisters and arrest them, but that tactic was not used. Pet. App. Brf. at 22-24. The use of the swinging baton tactic was also in violation of the MFF's continuum of force directives in cases of Civil Disorders, under which physical confrontation with a crowd is a tactic of last resort which should not be used unless tear gas is used and is ineffective. (App., *infra*, 19a); Pet. App. Brf. at 24-26.

The force expert retained by the Huntsville police department testified at deposition that there is no justification for striking a passive resister who refuses to move, and that no reasonable officer would fail to understand that fact. Pet. App. Brf. at 25. Lt. Della-Calce also admitted that under such circumstances, there was no justification for such actions, and reluctantly, that there was no justification for his order to strike the three seated Petitioners. *Ibid.*

2. With consent of the parties, the case was referred to a magistrate judge. After extensive discovery, defendants filed a motion for summary judgment in which Respondent claimed that the force used by the MFF was reasonable under the circumstances, and that he enjoyed qualified immunity from suit.

The trial court denied the motion with respect to Della-Calce, finding that the evidence, viewed in a light most favorable to Petitioners, required rejection of Respondent's qualified immunity claim. (App., *infra*, 25a). Evaluating "in the qualified immunity context" the reasonableness of the force using Graham v. Connor's "totality of the circumstances" test, 490 U.S. 386, 396 (1989), the trial court noted that the facts clearly favored Petitioners. (App., *infra*, 23a). Their only crime was disorderly conduct, a minor misdemeanor offense. *Ibid.* Petitioners posed no threat to the police or the public at large. *Ibid.* Lt. Della-Calce gave a single dispersal order before deploying the MFF against the protestors, and made no effort to arrest Petitioners prior to their clubbing. *Id.* at 24a. Finally, the court found that Petitioners, three of whom were seated with their backs to police, were engaged in peaceful passive resistance with their backs turned seconds before the order that resulted in their clubbing. *Id.* at 23a.

The court conceded there was no "controlling and factually similar case" that clearly established the unconstitutionality of Lt. Della-Calce's action, a requisite to overcome a defense of qualified immunity in the Eleventh Circuit. (App., *infra*, 22a). Nevertheless, he found that Lt. Della-Calce was not entitled to qualified immunity because the violation of Petitioners' rights was "readily apparent," even in the absence of a controlling, factually similar case, and thus met a "narrow exception" to the general rule requiring controlling and factually similar case law. Smith v. Mattox, 127 F.3d 1416, 1419 (1997). (App., *infra* at 22a-24a.) In these circumstances,

and also considering case law in other jurisdictions lending support to the conclusion that violence was clearly unnecessary against passive citizens engaged in peaceful demonstration, the court ruled that any reasonable officer would know that the force directed by Lt. Della-Calce was unconstitutionally excessive. *Id.* at 24a-25a.[4]

3. The Court of Appeals reversed the magistrate judge's opinion denying summary judgment, and dismissed the excessive force claim against Lt. Della-Calce. (App., *infra*, 4a). Addressing Respondent's qualified immunity defense, the court found that Lt. Della-Calce's order to march on the Petitioners was "arguably . . . objectively reasonable," (App., *infra*, 7a), since "[t]he tactical decision did not violate any 'clearly established' Fourth Amendment law concerning excessive force because there was no pre-existing law, arising in a factually similar context, which would have led every reasonable officer in Della-Calce's position to conclude inevitably that what he was

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[4] The cases cited by the Court for the proposition that unnecessary force is not justified against passive resisters, and officers lose their qualified immunity for such force are Winslow v. Hubbard, 900 F.2d 263 (9th Cir. 1989) (officers may not let train run over passive resisters), Secot v. City of Sterling Heights, 985 F. Supp. 715 (E.D. Mich. 1997) (no immunity for striking a union picketer who posed no threat), and Lamb v. City of Decator, 947 F. Supp. 1261 (C.D. Ill. 1996) (no immunity for unprovoked use of pepper spray on crowd who had merely committed trespass).

doing violated the command of the Fourth Amendment." (App., *infra*, 6a). Noting that its ruling was the appropriate application of the Eleventh Circuit's standard for qualified immunity, the court stated that in order to prove the existence of a clearly established law, "plaintiff must prove that case law was earlier developed

> in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law . . . pre-existing law must dictate, that is, truly compel the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*.

(App., *infra*, 6a). (emphasis in original), *citing* Lassiter v. Alabama A&M University, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc). The court also found that the absence of improper intent by Lt. Della-Calce made him immune from suit. *Ibid.*

The court of appeals cited 'facts' and factual characterizations which it believed were relevant to its application of qualified immunity. (App., *infra*, 7a). The court found that the crowd "swelled" to 800-1200 persons when Lt. Della-Calce gave his dispersal order. *Ibid.* This is in conflict with the trial court and the evidence, including the video. (App., *infra*, 12a-15a); Def. Ex. X. The appeals court suggested a relationship between the violence and the demonstrators at the

main gate, also rejected by the trial court's analysis. (App., *infra*, 13a). The appeals court also contradicts the trial court and the video by finding that Lt. Della-Calce had given numerous orders to the crowd to disperse, and that the crowd refused to do so. *Ibid.* The court below also erred in finding that "swinging baton mode" is a common crowd control tactic, despite the testimony by the police department's force expert that it was unheard of against passive resisters. Pet. App. Brf. at 25. Finally, the court of appeals found that the MFF was trained to go around passive resisters without hitting them, also in disregard of Petitioners' contrary evidence. Pet. App. Brf. at 15-17.

4. Petitioners sought rehearing on the grounds that the circuit court had based its ruling on factual assumptions that were contrary to Petitioners' evidence, all such factual inferences regarding disputed facts should have been in favor of Petitioners' evidence. Pet. App. for Rehearing. The Court denied the petition for rehearing without comment. (App., *infra*, 31a).

REASONS FOR GRANTING PETITION

This term, the Court heard arguments in Saucier v. Katz, __ U.S. __, No. 99-1977 (argued March 20, 2001) regarding whether the Fourth Amendment test for reasonable use of force and the "objective legal reasonableness" test for determining a government official's cognizance of "clearly established law"

for qualified immunity purposes are the same. In its brief on the merits, the Petitioner, represented by the United States government, urged this Court to resist the merger of qualified immunity and excessive force into a single test of reasonableness. Saucier, No. 99-1977, Brf. of Pet. (filed January 8, 2001). The government argued that the merger of the tests would impermissibly convert qualified immunity, a legal question, into a question of fact for a jury. *Ibid.* The government argued that an officer should only lose his immunity to suit when, based on the facts before him, viewed in the context of pre-existing law, he could not reasonably believe that a particular use of force was reasonable, and that the possibility that unreasonable force could be reasonably applied should be preserved. Saucier, No. 99-1977, Brf of Pet. at 41. Such a rule would not, it claimed, immunize government actors from obvious, clear wrongdoing, for "if there were a fact dispute concerning whether or not an officer gratuitously struck a compliant suspect with a truncheon, qualified immunity would be inappropriate, and obviously so; any belief that the Fourth Amendment permits such undue violence would be patently unreasonable." *Ibid.*

Despite the government's confidence that such patently unreasonable force could never be protected by qualified immunity, it has been so protected in this case on the grounds that such conduct does not violate "clearly established law" that would give an officer notice of a constitutional violation. (App., *infra*, 1a, 5a-6a), *citing* Lassiter v Alabama A&M University, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) (case law

containing "materially similar facts" must "dictate, that is, truly compel . . .the conclusion for every like-situated reasonable government agent that what defendant is doing violates federal law *in the circumstances.*" (emphasis added by lower court).

The Constitution is a hollow instrument if it does not protect against obvious violations of the substantive rights it is intended to guarantee. However, the Eleventh Circuit, as illustrated by this and other cases discussed *infra.*, applies qualified immunity in Fourth Amendment cases in a manner that substantially heightens the bar for redress of unconstitutional acts to a level that condones serious and obvious civil rights violations. The Eleventh Circuit's test for qualified immunity, because it substantially disrupts the balance between civil liberties and government interests, should be corrected by this Court. *See* Anderson v. Creighton, 483 U.S. 635, 638-639 (1987).

In seeking review, Petitioners are asking the Court to remedy the same misapplication of qualified immunity committed by the Sixth Circuit in the criminal context of 42 U.S.C. § 242 that the Eleventh Circuit commits in the civil context of 42 U.S.C. § 1983. United States v. Lanier, 520 U.S. 259 (1997). The Circuit's qualified immunity doctrine presents an outlying view which is at odds–sometimes brazenly–with explicit rulings of this Court. Certiorari should be granted to correct this deviation from the established constitutional norm. Alternatively, certiorari should be granted, or this case should be vacated and remanded, in order to correct the gross error of the

lower court in granting summary judgment to Respondent based upon qualified immunity.

I. The Test for Qualified Immunity Should Be Objective Legal Reasonableness, Intended to Provide a Government Official with Fair Warning of What Actions May Violate Clearly Established Rights.

Government officials can only be held liable for the violation of statutory or constitutional rights of others where the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For a plaintiff in a civil case to meet his burden of proving the existence of a clearly established right, it is not sufficient to demonstrate the existence of a highly generalized right. Anderson v. Creighton, 483 U.S. 635, 639. Rather, the right must be "clearly established" in a "more particularized, and hence more relevant sense," such that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. An action need not have been previously held unlawful in order for a government official to reasonably recognize the underlying established right violated by a contemplated action, but "in the light of pre-existing law

the unlawfulness must be apparent." *Ibid*; *see also* Wilson v. Layne, 526 U.S. 603, 614 (1999); United States v. Lanier, 520 U.S. 259, 270 (1997). In evaluating qualified immunity, a court should first determine whether there is a supported allegation of a deprivation of a constitutional right; without such a determination, constitutional questions would remain uncertain. Wilson, 526 U.S. 1697; County of Sacramento v. Lewis, 523 U.S. 833, 842 n. 5 (1998).

In United States v. Lanier, Justice Souter wrote for a unanimous Court that the test for qualified immunity in civil suits brought under 42 U.S.C. § 1983 and Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971), is the same test for the criminal defense of "fair warning," which requires that no person can be convicted of a criminal offense unless the person's actions were prohibited by "clearly established" law at the time the offense occurred. 520 U.S. 270. Lanier vacated the Sixth Circuit's holding that a judge committing simple sexual assault could not be convicted under 18 U.S.C. § 242, which prohibits willful deprivation of a constitutional right under color of state law, since the statute had never been interpreted to impose liability in "a factual situation fundamentally similar to the one at bar," and thus simple sexual assault could not fall within the coverage of the statute. 520 U.S. at 263, *citing* 73 F.3d 1380, 1393 (6th Cir. 1996).

In vacating the decision, the Court ruled that the Sixth Circuit's "fundamentally similar" standard was an unnecessarily high bar for recognizing reasonable notice of clearly established law. General constitutional rules can be a sufficient basis for

criminal or civil liability when applied to certain conduct, regardless of whether case law addresses the application of the legal rule in a factually similar context. 520 U.S. 271. The only question is whether the "contours of the rights [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." 520 at 270, *citing* Anderson, 483 U.S. 635. The Sixth Circuit rule, the Court aptly noted, failed to provide a constitutional remedy for obvious and extreme cases of constitutional deprivation such as child slavery rings, since the most bizarre and notorious constitutional deprivation will often present cases of first impression on their specific facts. 520 U.S. at 271; *see aiso* Wilson, 526 U.S. 603, 621 (STEVENS, J., dissenting).

Given that actions for damages "may offer the only realistic avenue for vindication of constitutional guarantees," Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982), state actors should not enjoy qualified immunity for actions that violate obvious and fundamental constitutional rights. Lanier, 520 U.S. at 270; Anderson, 483 U.S. at 639. Officials eligible to invoke qualified immunity are presumed to have a "knowledge of and respect for 'basic, unquestioned constitutional rights.'" Harlow, 457 U.S. 800, 815, *quoting* Wood v. Strickland, 420 U.S. 308 (1975). Nonetheless, the rule of qualified immunity is a test of "objective legal reasonableness," Anderson, 483 U.S. 635, 639. It strikes a conscious and particular balance which lower courts should not elaborate on by interpreting by means of additional, more onerous or *per se* rules such as the requirement in Lanier that

there be "fundamentally similar" Supreme Court case law to support a finding of "clearly established law" for qualified immunity purposes, since simple "fair warning" is the touchstone of the test. Lanier, 520 U.S. 259, 270.

Similarly, as Justice Scalia warns, reliance on a mere generalized reference to a constitutional protection would impermissibly "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights," for "it would transform the substantive of Harlow into a rule of pleading." *Id.* at 640. There can be no balancing where *per se* rules coopt the flexibility required to implement multi-factor tests.

Converting the "objective legal reasonableness" standard, by which government officials may be excused for reasonable mistakes in judgments that result in unconstitutional acts, cannot be converted into a formal rule of pleading without also conflicting with a much broader body of case law establishing the balancing of interests inherent in the Fourth Amendment's guarantee of freedom from unreasonable search and seizure. *See* Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967). The rule is not amenable to rigid construction, either strict or lax, that fails to consider the totality of the circumstances. Anderson, 483 U.S. 635, 639. *see also* Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985). By necessity, in the Fourth Amendment setting the qualified immunity defense is

dependent on the facts in question and the laws and legal precedents which they invoke. *Ibid.*

II. The Eleventh Circuit's View That a Government Official Is Entitled to Qualified Immunity, So Long as No Binding, Pre-existing Case Law Exists That Prohibits His Unconstitutional Actions in a Highly Similar Circumstance, Sets a Balance Between Civil Liberties and Government Function That Was Previously Rejected in United States v. Lanier.

The rule of the Eleventh Circuit simply abandons the balancing test of Anderson and Lanier. The plain error of the court below in failing to apply the proper standard is consistent with the Eleventh Circuit's rejection of Fourth Amendment claims in cases with minor, even picayune factual distinctions from existing case law recognizing actionable Fourth Amendment claims.[5]

Two recent *en banc* decisions, Jenkins v. Talladega Bd of Education, 115 F.3d 821 (11th Cir.1997), and Lassiter v.

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[5] At least one commentator has recognized that the Eleventh Circuit applies a unique standard to qualified immunity. *See* McIlwain, Smith v. Mattox: One Step Backward in the Eleventh Circuit's Quest for a Qualified Immunity Standard, 29 Stetson L. Rev 749 (2000); *McIlwain*, The Qualified Immunity Defense in the Eleventh Circuit and its Application to Excessive Force Claims, 49 Ala. L. Rev. 941 (1998).

Alabama A&M University, 28 F.3d 1146 (11th Cir. 1994), aptly demonstrate the Eleventh Circuit's infidelity to Anderson and Lanier. Lassiter involved a due process claim by a terminated professor that claimed, based upon the terms of his contract, that he was entitled to a hearing before his dismissal. 289 F.3d at 1151. The court ruled that because there was ambiguity as to the interpretation of his employment contract, the plaintiff's right to a hearing was not "clearly established" under Anderson, 483 U.S. 635, 639, despite the fact that the court never determined *whether* there was even a constitutional deprivation at all. *c.f.* County of Sacramento, 523 U.S. 833.

Lassiter stated that in the Eleventh Circuit, "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." 28 F.3d 1146, 1150 (citations omitted). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*. *Ibid.* "The line is not to be found in abstractions–to act reasonably, to act with probable cause, and so forth–but in studying how these abstractions have been applied in concrete circumstances." *Ibid*; *accord* Adams v. St. Lucie Co. Sheriff's Dept, 962 F.2d 1563, 1575 (11th Cir. 1992), *aff'd en banc*, 998 F.2d 923 (11th Cir. 1993).

In Jenkins by Hall v. Talladega City Bd. of Education, 115 F.3d 821 (11th Cir. 1997 (en banc), cert. denied, 522 U.S. 966 (1997), the court affirmed summary judgment based on

qualified immunity for teachers who, twice, strip searched two eight year old girls in search of seven dollars that had been stolen. Despite the Supreme Court's ruling in New Jersey v. T.L.O., 469 U.S. 325 (1985), applying the Fourth Amendment to searches on school grounds, the Jenkins court ruled that there was no established law which would make teachers responsible for applying the Fourth Amendment's reasonableness test absent a fact pattern similar to the one at bar in T.L.O.. Jenkins, 115 F.3d 821, 824-25 n. 2. Since T.L.O. was the only suit regarding school searches by the Court, it is not "applicable to the instant facts." 115 F.3d 821, 825 n. 3.

With respect to the standard of Lanier and the obvious similarity between the Eleventh Circuit's approach and the defunct Sixth Circuit approach, the court states that while Lanier holds that "general principles of law *can* provide fair warning, they do not *necessarily* provide fair warning unless the constitutional rule at issue may be applied 'with obvious clarity.'" 115 F.3d 821, 825 n. 3. On that ground, it chose to ignore T.L.O., ruling that school officials in that circuit would not have to apply its balancing test, because they "cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority." *Id.* at 827.

The most unsettling aspect of Jenkins is that like the *en banc* decision in Lassiter, the court spends pages defending the Circuit's rule that state actors are immune from suit unless their actions have been declared in binding precedent to be unlawful under the same or similar circumstances, then explains that the

holding of T.L.O. announced too generalized a right to apply it in the qualified immunity context beyond the facts of that case. 115 F.3d 821, 823-28. Consequently, the court *never applied the test of T.L.O. at all* and never determined whether the strip searches of the eight year old girls was a violation of their rights. *Ibid.*

This is the same disturbing problem apparent from reading the decision of the court of appeals in this case–the court simultaneously applies qualified immunity to dispose of the suit without determining the contours of the right in question by applying Graham v. Connor to establish whether the MFF uses excessive force. (App., *infra*, 1a). In all of these cases, not only does the Eleventh Circuit fail to identify a "clearly established right" by failing to evaluate constitutional reasonableness in a variety of contexts, it arrests the development of constitutional jurisprudence by simply opting out of the multi-factor analyses which the Supreme Court has developed, preferring instead a scholastic approach which, like all ill-fitting rigid rules, will continue to produce arbitrary results.

The Circuit's disingenuous sidestepping of Lanier in the Jenkins decision reflects a desire to protect the parameters of the qualified immunity doctrine the court has established for itself. It declared that its strict requirement of binding precedent was not affected by Lanier, since Lanier's rejection of the Sixth Circuit's rule requiring Supreme Court precedent

> did not address the extent to which decisions of the 'lower courts' must, should, or may be considered in deciding whether a constitutional right has been clearly established, nor did it identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place. We therefore do not construe Lanier as being in conflict with our precedent regarding the relevant decisional law to which we must look in analyzing a claim of qualified immunity.

115 F.3d 821, 827.

Other cases from the Circuit reflect the consequences of re-striking the constitutional balance of the qualified immunity doctrine. *See, e.g.*, Gold v. Miami, 121 F.3d 1442 (11th Cir. 1997) (qualified immunity claim granted on summary judgment affirmed in case alleging false arrest and excessively tight handcuffs; comment giving rise to arrest, "police don't do shit," is factually distinct from Florida Supreme Court case holding that use of "intemperate expletives" near police officers was protected speech, since Mr. Gold used a "loud voice;" Court never determines whether use of handcuffs was unlawful except for purposes of qualified immunity, stating only that "circumstances would not 'inevitably lead' a reasonable officer [to conclude] the handcuffs were unlawful."); Lentz v. Winburn, 51 F.3d 1540 (11th Cir. 1995) (social worker entitled to qualified immunity for warrantless entry into home to retrieve belongings

for comfort of child in state custody; social worker could not be expected to weigh Fourth Amendment reasonableness in that context, and there were no controlling cases putting her on notice of parent's possessory interests in child's items in home); Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994) (court need not determine whether police officer used unreasonable force where officer makes false, though arguably reasonable arrest of restaurant owner for allegedly exceeding seating capacity under fire code; officer put restaurant owner in choke hold and arrested him because he "raised his hands," which was perceived as resisting arrest); *see also* Belcher v. City of Foley, 30 F.3d 1390 (11th Cir. 1995) (judicial declaration regarding a right, if *dicta*, is insufficient to put government officials on notice for qualified immunity purposes; a holding must be binding precedent).

In the decision below, the court commits the same misapplication of qualified immunity by failing first to make the requisite inquiry into whether there was a deprivation of right, *i.e.*, whether there was excessive force under the Graham standard, and then misapplying the qualified immunity standard because it could discern no precedent making the clubbing of passive resisters unconstitutional because the Eleventh Circuit had not previously addressed unprovoked assault on citizenry as a crowd control tactic. (App., *infra*, 6a) The summary rejection of Petitioners' claims on the grounds that "no clearly established law" existed that forbade the clubbing of passive, non-resisting protestors almost defies comment it is so shocking,

particularly in light of the video evidence available to the appeals court. Pl. Ex. 1, Def. Ex. X. Moreover, the appellate court's factual findings, discussed *supra*, inexplicably defy the evidence of Petitioners and disregard the trial court's findings. Again, what should be most disconcerting from an institutional perspective is the failure of any effort on the part of the court to even determine if excessive force occurred, except to summarily conclude that there could be no excessive force without a showing of intentional misconduct, a subjective inquiry which has been expressly excluded from the factors which may lead to either a finding of excessive force, Graham, 490 U.S. 386, 397, or to a finding regarding immunity. Anderson, 483 U.S. 635, 642. (App., *infra*, 6a).

Regardless of the merits of these cases, the categorical rejection of claims on qualified immunity without providing any constitutional guidance for future acts of government officials in the Eleventh Circuit is fundamentally at odds with this Court's holdings. In its construction and its application, the Eleventh Circuit's test is functionally identical to the test rejected in Lanier, 520 U.S. at 270, and it threatens the same unconstitutional effects in future application.

The Eleventh Circuit's standard substantially heightens the balance struck by the Supreme Court between providing citizens with a remedy to protect against and deter constitutional wrongs, and the desire to allow state officials the freedom to perform their official functions without perpetual fear of lawsuit. Anderson, 483 U.S. 640. This court's decisions make clear that constitutional rights should not be defined by a rigid rule that

abandons case by case analysis. T.L.O., 469 U.S. 325; *see also* Anderson, 483 U.S. 635, 639; Lanier, 520 U.S. 259. Particularly with respect to remedial civil rights statutes, which, "in lieu of describing the specific conduct [forbidden], incorporate constitutional law by reference," Lanier, 520 U.S. 259, 265, general assertions of rights can be sufficiently apparent to give "fair warning" to government officials; a formal rule of precedent is simply not compatible with the qualified immunity doctrine's underpinning of objective reasonableness. Jenkins, 115 F.3d 821, 829-33 (Kravitch, J, dissenting).

Just as Justice Scalia warns that bright-line, yet fact-specific constitutional rule making would "Balkanize" the doctrine of qualified immunity, Anderson, 483 U.S. 635, 646, so too does limiting the exceptions to qualified immunity to instances in which pre-existing case law identifies particular acts, involving particular constitutional wrongs, under particularly analogous circumstances. Rather than adding fact-specific exceptions, one can expect the Eleventh Circuit's approach to result in the sub-dividing of the existing qualified immunity rule, as 'exceptions to exceptions' develop into a patchwork of cases with novel fact scenarios. Some such cases will invariably involve creative police tactics, that while unreasonable in the circumstances, continue to outpace Fourth Amendment jurisprudence because police and other state actors will, quite rationally, recognize the benefit of immunity afforded the devious. If this model for applying qualified immunity is allowed to continue, the relationship between right and remedy in claims of constitutionally excessive force will become

unmoored from any coherent model of Fourth Amendment jurisprudence.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13960

D.C. Docket no. 96-02342-CV-PWG-NE

SHERRY THURMOND, LEVIN HALL, et.al.,
PLAINTIFFS-APPELLEES

v.

DANIEL DELLA CALCE, Lieutenant, Individually,
and in his official capacity as a lieutenant with
the City of Huntsville Police Department, TOMMY MAYO,
et. al.,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Northern District of Alabama

[Filed: December 12, 2000]

Before: DUBINA, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

In this interlocutory appeal, appellants, Lieutenant Daniel Della-Calce and Officers Tommy Mayo, Paul Jones and Michael Culbreath, challenge the magistrate judge's order[1] denying qualified immunity to Lieutenant Della-Calce as to plaintiffs' § 1983 excessive force claim, and the court's order denying discretionary function immunity, as provided by § 6-5-338 of the Alabama Code, to Lieutenant Della-Calce and Officers Mayo, Jones and Culbreath as to plaintiffs' supplemental state law assault and battery claims.

The incident giving rise to the plaintiffs' civil rights suit occurred during a confrontation between members of the Mobile Field Force ("MFF") of the Huntsville Police Department and a crowd of between 800 and 1200 striking unionized rubber workers, of which the plaintiffs were members, outside the entrance of the Dunlop Tire Company plant in Huntsville, Alabama. The relevant facts are essentially undisputed. On September 6, 1994, the MFF was mobilized to the Dunlop plant in the early morning hours to monitor an ongoing union strike. After the protesters became disorderly and violent, the MFF declared the strike an unlawful assembly and broadcast a dispersal order over a bullhorn. MFF then officers began to march towards the crowd at "half-step" pace while tapping their shields with their batons to encourage the crowd to disperse. The plaintiffs emerged from the striking crowd and positioned themselves directly in front of the marching MFF officers, about twenty yards in front of the other strikers. As the MFF officers got closer, Lieutenant

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[1]This case was assigned to the magistrate judge with the consent of the parties. See 28 U.S.C. § 636(c)(1).

Della-Calce, the on-site MFF commander, ordered the front line of the MFF officers, which included Officers Mayo, Jones and Culbreath, to swing their batons out in front of their shields at waist level or lower arc as an additional show of force to further encourage the crowd to leave. When the MFF officers reached the plaintiffs' position, the officers continued to swing their batons and yelled at the plaintiffs to move or they would be struck. The plaintiffs did not move, and as the front line of the MFF officers continued to march past the plaintiffs, the officers struck the plaintiffs with their batons.

Based on this incident, plaintiffs sued Lieutenant Della-Calce, pursuant to 42 U.S.C. § 1983, alleging that Lieutenant Della-Calce's order to the front-line MFF officers constituted excessive use of force.[2] The plaintiffs also sued Lieutenant Della-Calce as well as Officers Mayo, Jones and Culbreath for assault and battery under Alabama law.[3]

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[2]We note that in their complaint, the plaintiffs alleged that Lieutenant Della-Calce ordered "the front line of the mobile field force unit to strike the plaintiffs with their batons." The trial court implicitly rejected this particular argument, instead analyzing Lieutenant Della-Calce's order to proceed in "swinging baton mode." We too are unpersuaded by plaintiffs factual assertion that Lieutenant Della-Calce actually ordered the MFF unit to strike plaintiffs. The record is devoid of any evidence to support this claim. Rather, the evidence establishes that Lieutenant Della-Calce only ordered the unit into a "swinging baton mode."

[3]Plaintiffs also sued the City of Huntsville. The trial court entered summary judgment in the City's favor and no issues directly relate to the City in this appeal.

On appeal, appellants argue that the trial court erred by concluding that Lieutenant Della-Calce was not entitled to qualified immunity as to the excessive force claim.[4] We review de novo a denial of summary judgment based on a claim of qualified immunity, construing the evidence and all reasonable inferences in the light most favorable to the plaintiff. See Crosby v. Paulk, 187 F.3d 1339, 1344 (11th Cir. 1999); Sheth v. Webster, 145 F.3d 1231, 1235-36 (11th Cir. 1998).

After a thorough review of the record and consideration of the parties' briefs, we conclude that the magistrate court erred by denying Lieutenant Della-Calce's motion for summary judgment based on qualified immunity and reverse.

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[4]The appellants also challenge the trial court's denial of discretionary function immunity pursuant to § 6-5-338 of the Alabama Code. However, since we have reversed and remanded the order denying summary judgment to Lieutenant Della-Calce on qualified immunity grounds, the only claims that remain -- supplemental state law assault and battery claims -- deal with complex questions of discretionary function immunity in the state of Alabama. "A proper resolution of the two state law causes of action will require a careful analysis of Alabama law--something the courts of Alabama are in the best position to undertake and, for reasons of federalism, should undertake in this sensitive area." Nolin v. Isbell, 207 F.3d 1253, 1258 (11th Cir. 2000). Therefore, as in Nolan, we conclude that the magistrate judge should dismiss the state law claims so that the plaintiffs may pursue them in state court.

Qualified immunity seeks to ensure that government officials can reasonably anticipate when their conduct may give rise to liability by creating liability only if the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right. See United States v. Lanier, 520 U.S. 259, 270 (1997). So long as a government official acts within the scope of his discretionary authority and does not violate clearly established law, the doctrine of qualified immunity protects him. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Government officials performing discretionary functions generally are immune from civil liability if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

Here, there can be little doubt that Lieutenant Della-Calce was acting within the scope of his discretionary authority at the time he ordered the front-line officers to march forward in a "swinging baton" mode. Moreover, the plaintiffs failed to prove a violation of "clearly established law." The plaintiffs' burden in this respect is heavy: for the law to be "clearly established," plaintiff must prove that case law was earlier developed "in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law." Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000)(citation omitted). Indeed, as we noted in Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1150 (11th Cir. 1994)(en banc), "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise

a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." (emphasis in original). Plaintiffs did not meet this heavy threshold. The tactical decision did not violate any "clearly established" Fourth Amendment law concerning excessive force because there was no pre-existing law, arising in a factually similar context, which would have led every reasonable officer in Della-Calce's position to conclude inevitably that what he was doing violated the command of the Fourth Amendment.

Nevertheless, the plaintiffs contend that Lieutenant Della-Calce's conduct falls within a "narrow exception" to the rule requiring clearly established case law, which we first suggested in Smith v. Mattox, 127 F.3d 1416, 1419 (11 th Cir. 1997). To come within this exception, plaintiffs must show that the defendant's conduct "was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without case law on point." Id. Lieutenant Della-Calce's conduct cannot be said to be "so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness was readily apparent to [him]." Id. Simply put, the plaintiffs have not made the strong showing, required under Smith, that Lieutenant Della-Calce engaged in intentional misconduct by ordering the MFF unit to proceed at half-step and to initiate swinging baton mode. The most the plaintiffs could argue is that Della-Calce reasonably should have foreseen that the plaintiffs would not disperse in the face of the police officers' order that they move, and that he also should have reasonably foreseen that the plaintiffs would be struck by MFF officers.

Della-Calce's decision to issue the order did not violate clearly established Fourth Amendment law.

Construing the facts in the light most favorable to the plaintiffs, Lieutenant Della-Calce's order to the MFF officers to proceed at a "half-step" pace in "swinging baton mode," which fell within his discretionary authority as the on-site commander of the MFF unit in charge of directing the tactical operations of the unit, arguably was objectively reasonable in light of the facts and circumstances confronting him. Among other things, the evidence established that: (1) when Lieutenant Della- Calce ordered the MFF troops to move at "half-step" pace towards the strikers, the crowd had swelled to between 800 and 1200 persons and had been declared a riot situation; (2) members of the crowd had engaged in violent conduct including throwing objects at passing cars thereby causing personal injury and property destruction; (3) the striking workers refused to disperse despite numerous orders to do so from Lieutenant Della-Calce; (4) after the MFF officers marched at "half-step" pace, approached the crowd, and tapped their batons against their shields, the workers still did not disperse; (5) Lieutenant Della-Calce ordered the front line officers into "swinging baton mode," a common police tactic to encourage crowd dispersal; (6) when proceeding in "swinging baton mode," MFF officers are specifically trained to walk around or past passive resisters without striking them with their batons. Indeed, Lieutenant Della-Calce's order to march in "swinging baton mode" towards the rioters did not constitute excessive force since the plaintiffs have presented no evidence that Lieutenant Della-Calce acted with an improper intent to inflict force upon the plaintiffs.

In sum, based on a thorough review of the evidence developed in the trial court, even construed in the light most favorable to the plaintiffs, we cannot conclude that Lieutenant Della-Calce's conduct was so substandard that he should be stripped of the protection of qualified immunity. See Lassiter, 28 F.3d at 1149 ("[t]hat qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against them in their individual capacities."); Santamorena v. Georgia Military College, 147 F.3d 1337, 1340 n. 6 (11th Cir. 1998)(noting that Lassiter doctrine states the "usual rule" for determining the applicability of qualified immunity, and that the "exceptional cases rarely arise.").

Accordingly, we hold that the magistrate court erred by denying Lieutenant Della-Calce's motion for summary judgment based on qualified immunity, and we reverse and remand with instructions that final summary judgment be entered in favor of Lieutenant Della-Calce as to the excessive force claim. Moreover, in light of the complicated issues of purely state law that remain, we direct the magistrate judge to dismiss the supplemental state law claims without prejudice so that they may be pursued in state court.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

No. 96-PWG-2342-NE

SHERRY THURMOND, et. al.,
PLAINTIFFS,

v.

CITY OF HUNTSVILLE, et. al.,
DEFENDANTS.

MEMORANDUM OF DECISION

This matter is before the undersigned magistrate judge on defendants' motion for summary judgment. (Document #88). The parties have consented to the exercise of jurisdiction by

the magistrate judge. (See documents #85 and #86). Sherry Thurmond, Levon Hall, Ronnie Hopper, Davis Rollins and Larry Thomas have alleged causes of action for excessive force, failure to train and assault and battery based on acts occurring during a strike on September 6, 1994. Several defendants have previously been dismissed on plaintiff's motion. (Documents #53, #66, #87). There are five defendants remaining in this action, City of Huntsville ("COH") and Huntsville police officers Daniel Della-Calce, Tom Mayo, Paul Jones and Mike Culbreath. In their response to defendants' motion for summary judgment, plaintiffs agreed to the dismissal of defendant Richard V. Ottman, individually. (Document #93, pp. 2,59)[1] Plaintiffs have also agreed to the dismissal of the § 1983 and state law failure to train claims. (Document #93, pp. 2,59). The only claims remaining are plaintiffs' § 1983 excessive force claim against COH and Della-Calce, plaintiffs' state law claims for intentional assault and battery against Della-Calce, Mayo, Jones, and Culbreath, and plaintiffs' state law claim for

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[1]In plaintiffs' first amended complaint, the defendants, with the exception of the City of Huntsville, were all sued only in their individual capacities. (Documents #65, ¶3).

negligent assault and battery against COH and Della-Calce.[2]

Summary judgment is appropriate judgment only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 56, *Federal Rules of Civil Procedure.* In making that assessment, the court must view the evidence in a light most favorable to the non-moving party and must draw reasonable inferences against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues and that he is due to prevail as a matter of law. *See Clark v. Coats & Clark, Inc.* 929 F.2d 604 (11th Cir. 1991) Once that initial burden has been carried, however, the non-moving party may not merely rest upon his pleading, but must come forward with evidence supporting each essential element of his claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Barfield v. Brierton*, 883 F.2d 923 (11th Cir. 1989). Unless the plaintiff, who carries the ultimate burden of proving his action, is able to show some evidence with respect to each element of his claim, all other issues of

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[2] Plaintiffs stated that they never intended to assert intentional assault and battery claims against the city and never intended to assert negligent assault and battery claims against Mayo, Jones and Culbreath. (Document #93, p.2) Clearly, any claim against the City for intentional assault and battery is barred by *Alabama Code*, § 11-47-190. Plaintiffs have conceded that any claims against Mayo, Jones and Culbreath would be barred by the two year statute of limitation. (Document #93, p.58).

fact become immaterial and the moving party is entitled to judgement as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Bennett v. Parker*, 898 F.2d 1530 (11th Cir. 1990). As the Eleventh Circuit has explained:

> Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial ." [Citation omitted]. Thus, under such circumstances, the public official is entitled to judgment as a matter of law, because the plaintiff has failed to carry the burden of proof. This rule facilitates the dismissal of factually unsupported claims prior to trial.

898 F.2d at 1532

The following facts are undisputed or, if disputed, viewed in the light most favorable to plaintiffs. On or about June 21, 1994 the union employees of the Dunlop Tire Company ("Dunlop Plant") went on strike. Plaintiffs were participants in this strike. Apparently because of the close vote in late August or early September 1994 in which a proposed contract was rejected, there was concern among the strikers that many union workers would cross the line and return to work on September 6, 1994. As a result of this concern the strikers

decided to assemble at the Dunlop plant during the early morning hours of September 6, 1994 as a show of unity and solidarity. During the months preceding September 1994 there were sixteen to twenty strikers engaged in picketing at the Dunlop plant at any given time. On September 6, 1994, between 600 and 1200 strikers were at the plant.

The Mobile Field Force (MFF) of the Huntsville Police Department arrived at the Dunlop plant around 5:00 a.m. on August 6, 1994. After the MFF arrived on the scene, there were numerous incidents of objects being through at cars traveling along Dunlop Boulevard, resulting in property damage to cars and some personal injury. The destructive activity took place on the road away from the main gate area. Plaintiffs were located in the main gate. At approximately 5:45 a.m., the MFF moved toward the main gate entrance of the Dunlop plant. At 5:46 a.m. Lt. Della-Calce read a dispersal order to strikers over a bullhorn advising the crowd that the situation had been declared an unlawful assembly, that everyone was required to leave the area immediately and that they would be arrested if they failed to disperse. In order to encourage the crowds departure, approximately one minute after the dispersal order was read Lt. Della-Calce ordered the MFF to march toward the crowd at a half-step pace while tapping their protective shields. After the MFF began marching toward the crowd, plaintiffs Thurmond, Hall and Hopper sat directly in the pathway of the MFF on Dunlop Boulevard with their backs to the MFF. Plaintiffs Thompson and Rollins joined the other plaintiffs but stood facing the MFF. The MFF continued to march forward at half-step pace toward plaintiffs. The main body of strikers were at least

twenty yards from the plaintiffs. Although the assembled strikers were vocal, they were not violent. When the MFF got within a few yards of the plaintiffs, Lt. Della-Calce ordered the MFF to swing their batons in front of the shields in a waist level or lower arc. As the MFF marched toward plaintiffs swinging their batons, MFF officers yelled at plaintiffs to move or they would be struck.

Plaintiffs did not move and were struck by the officers in the front line of the MFF. [3] Prior to being struck plaintiffs made no aggressive display. No attempt was made to arrest plaintiffs before they were struck by the front line officers who had continued to swing their batons as commanded by Lt. Della-Calce. Plaintiffs Thurmond, Hall and Hopper were arrested after they were struck. Plaintiffs Thurmond, Hall and Hopper were also struck with batons during the course of their arrest and cuffing. In the second amended complaint, plaintiffs complain only of the front line's striking of plaintiffs while marching towards plaintiffs while swinging their batons in a waist level or lower arc. (Second Amended Complaint ¶16, 23, 27). The complaint does not challenge the striking of plaintiffs while officers were attempting to handcuff plaintiffs.

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[3] Plaintiff Thurmond was struck by defendant Mayo, plaintiff Hall was struck by defendant Culbreath, plaintiff Hopper was struck by defendant Jones, plaintiff Rollins was struck by Officer Sharp and plaintiff Thompson was struck by Officer J. Jones. Neither Sharp nor J. Jones are defendants in this action.

Although plaintiffs did not make a formal complaint (plaintiff's Exhibit #25, p. 108), Ottman nevertheless sought an opinion from an outside force expert, Ron Kiker. (Plaintiff's Exhibit #24, p.99). Kiker addressed only the actions of the arrest team because he was not asked to give an opinion about what happened before the arrest team came into contact with two of the plaintiffs. (Plaintiff's Exhibit #31, pp.36, 72) In addition, Captain Jack Meeks, Director of Training, reviewed the videotape and advised Ottman by memorandum that the force used by the arrest team was justified. (Defendants' Exhibit BB). Meeks further testified that his concentration was on what took place by the arrest team rather than by the front line. (Defendants' Exhibit O, pp. 31-32).

I. Excessive force claim

A. City of Huntsville

A municipality is not liable under the theory of respondent superior in a § 1983 action based on the wrongful actions of its police officers. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978): *Gold v. City of Miami*, 151 F.3d 1345, 1350 (11th Cir. 1998)

"[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." *Monell*, 436 U.S. at 694. Municipal liability does not attach unless the municipality's policies are the "moving force" behind the constitutional violations. *Board of*

the County Comm'rs of Byran County v. Brown, 520 U.S. 397 (1997). Municipal liability may be imposed under the following circumstances: (1) an officially promulgated policy sanctioned or ordered by the municipality, *see Pembaur v City of Cincinnati*, 475 U.S. 469, 480 (1986): *Monell*, 436 U.S. at 690; (2) a pervasive custom or practice approved of by the municipality or which the municipality is aware or should be aware, *see City of St. Louis v. Praprotnik* 485 U.S. 112, 130 (1988); *Oklahoma v. City of Tuttle*, 471 U.S. 808, 823-24 (1985); *Monell*, 436 U.S. at 690; (3) a single act taken by the municipal employee who, as a matter of state law, has final policymaking authority with respect to the area in which the action is taken, *see McMillan v. Monroe County*, 520 U.S. 782, 784 (1997); *Praprotnik*, 485 U.S. at 129-30; *Pembaur* 475 U.S. at 480-83: or (4) where the failure of the municipality to train its employees rises to the level of deliberate indifference to the constitutional rights of others, *see City of Canton v. Harris*, 489 U.S. 378, 388, (1989).

There is no contention that COH has an officially promulgated policy that allows the use of excessive force on passive resisters. Further, as previously noted, plaintiffs have withdrawn both their Section 1983 and their state law failure to train claims.

Plaintiffs argue that the COH has a custom of permitting officers to use excessive force. Plaintiffs allege that despite the fact that 150 excessive force complaints were filed during the 10 years preceding September 6, 1994, Chief Ottman never sustained a charge of excessive force by an officer during an arrest. (Doc. #93, plaintiffs' response, p.31)

Plaintiffs, however, do not advise the court how many of the 150 excessive force complaints actually involved the use of force prior to or during an arrest or if the complaints involved passive resisters. Instead, plaintiffs submitted as exhibits documents from fifteen selected files involving allegations of excessive force during arrests in which no disciplinary action was taken. (See plaintiff's Exhibit #15 (exhibits Q-EE)). Plaintiffs have failed to show that any of these complaints actually had merit. The mere number of excessive force complaints bears no relation to their validity. *Gold v. City of Miami*, 151 F. 3d 1346, 1351, (11th Cir. 1998); *Brooks v. Scheib*, 813 F.2d 1191, 1193-95 (11th Cir. 1987)[4]

Plaintiffs also allege that Ottman's failure to initiate any investigation into the front line's assault of plaintiffs shows

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[4] Four of the complainants in the fifteen files did not wish to make statements to the Internal Affairs' investigator (plaintiff's Exhibit #15, Q.R.AA,BB) and one of the complainants could not remember anything about his arrest. (Plaintiff's Exhibit #15, CC). Under these circumstances, it would be extremely difficult for Internal Affairs to recommend that a complaint be sustained. In addition, in some of the files, the investigator noted that there were no injuries or only minor injuries. The lack of injury may be considered in determining that the force used was not excessive. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) (reaffirming that not every push or shove violates the Fourth Amendment): *Crosby v. Paulk*, __F.3d___, 1999 W.L. 703193, *8 (11th Cir., September 10, 1999)("In making this objective assessment [whether the officer's use of force was objectively reasonable], court may consider in addition to physical injury 'other relevant actors...'"*See also Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) ("The minor nature of injury [skin abrasions for which plaintiff did not seek medical treatment] reflects that minimal force was used to apply the handcuffs.")

the city's custom of permitting excessive force. First, plaintiffs did not file a formal complaint which they certainly could have done. Second, the video tapes do not present a clear view of what occurred on September 6, 1994. It is apparent that the MFF was marching toward plaintiffs while swinging the batons at waist level or lower. Many of the actions of the arrest team were clearly visible and generated comment from the local television station. What happened prior to that, when the front line descended upon plaintiffs, is much less clear. Without more, it is inappropriate to look at Ottman's failure to initiate an investigation as evidence of the city's custom prior to the September 6, 1994 incident.

While plaintiffs complain that the procedure used for reviewing complaints supports a custom of failing to discipline acts of excessive force, this is also without merit. Formal citizen complaints are investigated by a separate internal affairs unit of the police department. (Plaintiffs' Exhibit #10) Further, the formal complaint is investigated by Internal Affairs and then reviewed by the police chief. (Plaintiff Exhibit #9). While reviewing the findings and recommendations of the Internal Affairs Department, the police chief exercises his own independent judgment. (Plaintiffs Exhibit #25, pp.29-30). This exercise is based on the information he received from Internal Affairs. (Plaintiff's Exhibit #25) Plaintiffs have not introduced evidence that the police chief ignored or failed to consider the findings and recommendations by Internal Affairs. The fact that the chief was not absolutely bound by the Internal Affair's conclusion does not render the complaint system deficient. Further, plaintiffs have failed to show that the complaint procedure

was a moving force of the constitutional violation and that plaintiffs' injuries would have been prevented by a different complaint procedure. *Brooks*, 813 F.2d at 1195.

Plaintiffs also argue that Ottman was a final policymaker for the COH in the area of law enforcement and that he delegated his policymaking authority concerning the MFF to Della-Calce thereby in effect making Della-Calce a final policymaker. While a final policymaker may delegate his power to a subordinate whose decisions, if unconstrained and not subject to review would then constitute official policy, *see, Paprotnik,* 485 U.S. at 125-28, Della-Calce's decision was not unconstrained. Rather, Della-Calce was constrained by the policies and procedures of the COH, including the Civil Disorder and Use of Force written directives. (Defendants' Exhibit U, ¶7). The Civil Disorder written directive clearly stated that movement of the MFF is the last alternative and further states that marching with swinging batons is the last progression. (Defendants' Exhibit CC, p.5). Further, the Use of Force Written directive states "officers will exert only the degree of force necessary to effect the arrest or compliance with lawful orders; more will be considered excessive force." (Defendants' Exhibit DD, p.2). The directive further describes when a baton may be used. (Defendants Exhibit DD, p.4).[5]

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[5]The court further notes that *Alabama Code* § 13A-3-27(a)(1)(2) specifies that a peace officer may use physical force which he reasonably believes to be necessary in order to make a misdemeanor arrest or to protect himself while making a misdemeanor arrest.

Further, COH trains all of its police officers that there is no justification for striking passive resisters with impact weapons. (Defendants' Exhibit V, affidavit of Kirk Giles).[6] "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them are the act of the municipality" *Praprotnik*, 485 U.S. at 127. Defendant Della-Calce's action complained of here does not support an inference of municipal custom or policy.

Further, Della-Calce's decision was subject to review by his superiors and the Chief of Police. (Defendants' Exhibit U, ¶ 7, Defendants' Exhibit G, pp. 103-04; Defendants' Exhibit I, p. 225). The fact that his decision that was subject to review was not in fact subjected to review does not render Della-Calce a final policy maker. Because Della-Calce was not a final policymaker and because plaintiffs have not shown a pervasive custom or practice approved of by COH, COH is entitled to summary judgment on plaintiffs' excessive force claim.

B. Della-Calce

An excessive force claim brought under § 1983 for conduct occurring "in the course of an arrest, investigatory stop, or

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[6]In written examinations, Della-Calce, Mayo, Jones, Culbreath all indicated that the statement # 18, "To strike a passive resister with an impact weapon is justified" was false. (Defendants' Exhibits V-1, V-2, V-3 and V-4).

other 'seizure' of a free citizen should be analyzed under the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Supreme Court has described the test of reasonableness under the Fourth Amendment as follows:

> ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9, 195 S. Ct., at 1699-1700 (the question is "whether the totality of the circumstances justifie[s] a particular sort of seizure").
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... "Not every push or shove, even if it my later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

490 U.S. at 396-397.

In *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997), the Eleventh Circuit explained the law of qualified immunity in the context of a Fourth Amendment claim where there is no factually similar case:

> An official sued as an individual is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ... "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Fourth Amendment jurisprudence has staked no bright line for identifying force as excessive. Therefore, unless a controlling and factually similar case declares the official's conduct unconstitutional, an excessive-force plaintiff can overcome qualified immunity only by showing that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official,

> notwithstanding the lack of case law. Smith cites no Fourth Amendment case, and this court has located none, in which a police officer subjected a previously threatening and fleeing arrestee to nondeadly force after the arrestee suddenly became docile. Smith therefore must show that Mattox's conduct was so far beyond the hazy border between excessive and acceptable force that Mattox had to know he was violating the Constitution even without case law on point.

Smith v. Mattox, 127 F.3d at 1419. Applying the test set forth in *Graham* in the qualified immunity context, the Eleventh Circuit concluded that the grunt and the blow that plaintiff heard and felt when the officer pulled plaintiff's arm behind his back coupled with the severity of his injury [a broken arm] and the fact that the plaintiff was offering no resistance at all pushed the case over the line.

Likewise, in the case before this court plaintiffs were guilty of a minor offense, disorderly conduct, a misdemeanor. Plaintiffs were passively resisting by sitting in the path of the MFF. Only yards and seconds before the Mobile Field Force (MFF) squad reached plaintiffs, defendant Della-Calce ordered the squads to change from shield striking mode to baton swinging mode resulting in a substantial likelihood that at least some of the plaintiffs would be struck by the swinging batons.

There was no evidence that the plaintiffs, three of whom sat on the ground with their backs to the MFF, posed any threat to the officers. Although defendants allege that some officers were struck by objects while marching toward plaintiffs, this is in dispute. Captain Roger Dean, the highest ranking officer on site, did not see or hear objects being thrown. (Plaintiffs' Exhibit 26 at 129, 186, 190). At least two officers admitted they did not see or hear objects being thrown and plaintiffs did not see or hear objects being thrown. (Plaintiffs' Exhibit 49 at 38; plaintiffs' exhibit 48 at 30-31; plaintiffs' exhibit 16 at 128; plaintiffs' exhibit 18 at 81-82; plaintiffs' exhibit 20 at 145; plaintiffs' exhibit at 17 at 77-78; plaintiffs' exhibit 19 at 58-59, 94). Further the videotapes do not show objects being thrown at the MFF. Plaintiffs were struck by the front line of the MFF prior to any attempt to arrest them.

This case, as did *Smith v. Mattox*, "falls within the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying case law." *Smith v. Mattox*, 127 F.3d at 1420.[7] This result is consistent

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[7]*See also Sheth v. Webster,* 145 F.3d 1231 (11rh Cir. 1998) and *Thornton v. City of Macon,* 132F.3d 1395 (11th Cir. 1998). These cases relied on by plaintiffs, are arguably distinguishable in that while the court applied the *Graham* test, the court also concluded that the officers had no probable cause to arrest the plaintiffs and, as a result, were not justified in using any force. Plaintiffs in this case have not alleged that there was no probable cause to arrest them. *See also Nolin v. Town of Springville,* 45 F.Supp. 3d 894, 906-07 (N.D. Ala. 1999), *appeal pending*, (Police officer not entitled to qualified immunity on excessive force claim when "play fight" had ceased, offense was disorderly conduct, there was no attempt to

with the holdings by other courts involving excessive force claims arising out of demonstrations, protests and strikes. In *Wilson v. Hubbard*, 900 F.2d 263, 1990 W.L. 43011 (9th Cir. 1989), the court held that officials who allowed a train to crash into protesters were not entitled to qualified immunity because a reasonable official would know that such an act would be in violation of substantive due process of law or, alternatively, would be excessive under the Fourteenth Amendment. In *Secot v. City of Sterling Heights*, 985 F.Supp. 715 (E.D. Mich. 1997) the court held that a police officer who struck plaintiff with a baton while he was peaceably standing in a picket line and not threatening an officer or other member of the police was not entitled to qualified immunity. In *Lamb v. City of Decatur*, 947 F.Supp. 1261 (C.D. Ill. 1996), the court held that police officers who sprayed pepper spray into a crowd of unarmed labor demonstrators were not entitled to qualified immunity. The *Lamb* court noted that the severity of the crime was at most trespass. Plaintiffs did not pose an immediate threat to the safety of the officers or others as they were unarmed, plaintiffs were not actively resisting arrest, and the police arrested only one demonstrator and that was after he had been sprayed with pepper spray.

The facts of this case make the unlawfulness of defendant Della-Calce's ordering the MFF to swing batons while marching toward the passively resisting plaintiffs readily apparent even without a factually similar Eleventh

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plaintiff to threaten anyone or resist arrest, and officer kneed plaintiff in the back and shoved his face and chest against van.)

Circuit case. Defendant Della-Calce is not entitled to qualified immunity with respect to the excessive force claim.

II. State law claims

With respect to plaintiffs' claims of assault and battery, defendants argue that they are entitled to discretionary function immunity under *Alabama Code* §6-5-338 (1975) which provides in pertinent part:

> (a) Every peace officer ... whose duties ... include the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.
>
> (b) This section is intended to extend immunity only to peace officers and governmental units or agencies authorized to appoint peace officers.

In *Wright v. Wynn*, 682 So.2d 1 (Ala. 1996), the Alabama Supreme Court discussed the doctrine of discretionary function immunity:

> Discretionary acts have been defined as those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances. See *L.S.B. v. Howard*, 659 So.2d 43 (Ala. 1995) ....
>
> [A] state officer or employee is not protected under the doctrine of discretionary function immunity if he acts willfully, maliciously, fraudulently, or in bad faith. Acts of such a nature are not considered to be discretionary in nature within the meaning of our cases.

In *Town of Loxley v. Coleman*, 720 So.2d 907, 909 (Ala. 1998), the Alabama Supreme Court explained the difference between discretionary and ministerial functions:

> [D]iscretionary functions are characterized by planning and decision-making, while ministerial functions are characterized by operational task." *Ex parte Alabama Dep't of Forensic Sciences*, 709 So. 2d at 458. Where the exercise of a defendant's function requires due care, rather than difficult decision-making, the function is merely

> ministerial. *Bell v. Chisom*, 421 So.2d 1239, 1241 (Ala. 1982).

The Alabama Court of Criminal Appeals recently discussed the concept of malice:

> Legal malice may be defined as "the intentional doing of a wrongful act without just cause or excuse, either with an intent to injure the other party or under such circumstances that the law will imply an evil intent." *Empiregas, Inc. v. Feely*, 524 So.2d. 626, 628 (Ala. 1988). Moreover, malice is generally a fact issue; "the existence of malice being a fact which in the nature of things is incapable of positive, direct proof, it must of necessity be rested on inferences and deductions from facts" that can be presented to the trier of fact. *National Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133, 140 (Ala. 1983).

Hinson v. Holt, 1998 W.L. 802752, *6 (Ala. Civ. App. 1998).

Della-Calce, acting in a supervisory role over the MFF, may have been performing a discretionary function. *L.S.B. v. Howard*, 659 So.2d 43, 44 (Ala. 1995)("The exercise of supervisory functions is usually discretionary, because it requires 'constant decision making and judgment' by the person in the supervisory role.") Conversely, the members of the MFF were performing ministerial functions in following

Della-Calce's orders.[8] Assuming, however, that the actions of all of the individual defendants were viewed as discretionary, none of these defendants are entitled to discretionary function immunity because there is a fact question presented whether excessive force was used in striking plaintiffs with batons prior to attempting to arrest them and such a question necessarily raises a question of whether the act was wilful, malicious, fraudulent or in bad faith. *See Wright v. Wynn*, 682 So.2d 1, 2 (Ala. 1996); *Sheth v. Webster*, 145 F.2d 1231 (11th Cir. 1998).

The *Wright* court explained why it granted the state trooper's motion for summary judgment on the false imprisonment claim while denying the motion for summary judgment on the assault and battery claim:

> Clearly, Wright's duties as a law enforcement officer required him to make a split-second identification under difficult circumstances. Although, regrettably, Wright made the wrong decision in arresting Wynn, his decision nonetheless falls within the definition of a "discretionary act" as discussed in our cases.

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[8]The Civil Disorders written directive lists as one tactic used in crowd control "Do Not allow independent actions (all activity is on command from the Field force Commander)." (Defendants' Exhibit CC, p.4, 10A.8). Captain Kinney Bryant also testified that officers are not trained that they have discretion whether to follow orders but rather it was critical that everyone follow orders. (Defendants' Exhibit 45, pp. 54-55).

> Because the record indicates that a fact question was presented as to whether Wright used excessive and illegal force in arresting Wynn, we cannot agree that the doctrine of discretionary function immunity precludes Wynn's assault and battery claim. A mistake in identifying a suspect is one thing; abusing a suspect who has been detained and subdued is quite another. Simply put, a state trooper has a legal obligation to conduct himself in a professional manner and within the bounds of law in making an arrest. Another jury should be allowed to determine whether Wright met that obligation under the facts of this case. (Emphasis added).

This case when viewed in light of *Wright v. Wynn* requires that a jury be allowed to determine whether defendants are liable for assault and battery. Defendants Della-Calce, Mayo, Jones and Culbreath are not entitled to summary judgment with respect to the assault and battery claims.

Further, the COH is not entitled to summary judgment based on the negligent assault and battery claim against Della-Calce and § 11-47-190 which does not immunize municipalities from the negligence of city employees. *See Franklin v. City of Huntsville*, 670 So.2d 848 (Ala. 1995); *Luckie v. City of Montgomery*, 1999 W.L. 64930 (Ala. Civ. App. February 12, 1999).

A separate order consistent with this Memorandum of Decision will be entered simultaneously herewith.

DONE this the 22nd day of September, 1999.

/S/ PAUL W. GREENE
PAUL W. GREENE
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13960-FF

SHERRY THURMOND, et. al.,
PLAINTIFFS-APPELLEES,

v.

CITY OF HUNTSVILLE, et. al.,
DEFENDANTS;

DANIEL DELLA-CALCE, Lieutenant, Individually
and in his official capacity as a lieutenant with the
City of Huntsville Police Department, et. al.,
DEFENDANTS-APPELLANTS.

On Appeal form the United States District Court for the
Northern District of Alabama

BEFORE: DUBINA, MARCUS AND WILSON, Circuit Judges.

Per Curiam:

The petition (s) for rehearing filed by Appellees, Sherry Thurmond, , et al., is DENIED.

ENTERED FOR THE COURT:

/s/STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Lodged with the Court is a videotape containing two brief excerpts from two of the four videos admitted into the record below.

1. The first video clip is footage of the incident shot by a cameraman from a local television station. It is excerpted from video commonly referred to below as the "Channel 31 videotape" which Petitioners submitted as Plaintiffs' Exhibit 1 in the proceedings below. The videotape itself physically bears its exhibit number from deposition, Plaintiffs' Exhibit 38.

2. The second video is footage shot by a police officer within the line of MFF officers. In summary judgment proceedings below, it was submitted as Defendants' Exhibit X. The videotape itself physically bears its exhibit number from deposition, Plaintiffs' Exhibit 11.

Combined, the footage is about six minutes.